BEFORE THE ARIZONA CORPORATION COMMISSION

RENZ D. JENNINGS
CHAIRMAN
MARCIA WEEKS
COMMISSIONER
CARL J. KUNASEK
COMMISSIONER

IN THE MATTER OF THE PETITION OF TCG PHOENIX FOR ARBITRATION PURSUANT TO § 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996 TO ESTABLISH AN INTERCONNECTION AGREEMENT WITH U S WEST COMMUNICATIONS, INC. PURSUANT TO SECTION 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996.	DOCKET NO. U-3016-96-402 DOCKET NO. E-1051-96-402
IN THE MATTER OF THE PETITION OF MFS COMMUNICATIONS COMPANY, INC. FOR ARBITRATION OF INTERCONNECTION WITH U S WEST COMMUNICATIONS, INC., PURSUANT TO 47 U.S.C. § 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996.	DOCKET NO. U-2752-96-362 DOCKET NO. E-1051-96-362

COMMENTS OF BROOKS FIBER COMMUNICATIONS OF TUCSON, INC.

Brooks Fiber Communications of Tucson, Inc. ("Brooks"), hereby submits its Comments to the Arizona Corporation Commission ("Commission") on the Recommended Opinion and Orders in the above-captioned matters (the "TCG Recommended Order" and the "MFS Recommended Order" or, alternatively, the "Recommended Orders"). Brooks is concerned that the Commission's adoption of the Recommended Orders may prejudice Brooks' position on certain issues in its own arbitration proceeding with U S West, which is presently scheduled for hearing on November 6th.

Interim Rates for Unbundled Loops

In its August 30, 1996 Procedural Order, the Commission indicated that it would utilize the Federal Communications Commission ("FCC") recommended prices for purposes of setting interim interconnetion/wholesale rates, subject to true-up after the consolidated arbitration proceeding on U S West's proposed cost studies and interconnetion/wholesale prices had been concluded. For no explained reason, the Recommended Orders now abandon the FCC recommended prices for interconnetion and, for example, set an interim rate for unbundled loops based on the mid-point between the FCC recommended loop price and U S West's proposed $30.67. Although the Recommended Orders indicate that all interim rates will be subject to true-up, there is simply no reason to depart from the terms of the August 30th Procedural Order.

First, there is no legal impediment to a state's use of the FCC recommended rates. The stay of that portion of the FCC's Order by the 8th Circuit Court of Appeals does not prevent states from adopting the FCC recommended prices on their own authority, as is expected by the FCC in may instances. Indeed the Recommended Orders themselves use the FCC recommended price range in establishing resale discount.

Second, the FCC recommended prices were not arbitrarily picked out of thin air. They represent the considered result of an incremental cost analysis using the Hatfield cost-of-service methodology as adjusted for state-specific factors. Because the Hatfield study is believed by the unbiased experts at the FCC to be a good proxy for or check on the likely results of a properly done "total element long-run incremental cost" or "TELRIC" study (hence the term "proxy" prices for the FCC recommended rates), the FCC recommended loop price is far more likely to be closer to the final price arbitrated by this Commission than $21.76 - a rate higher than any found so far by any regulatory agency anywhere in the United States.

Further, the interim price set for unbundled loops, in the context of the effective market ceiling price for residential service set by U S West's own residential tariff, will prevent residential customers from enjoying the benefits of competition until at least the cost methodology portion of the various arbitration petition proceedings is finally resolved. Simply stated, a loop rate of $21.76 effectively precludes competitors such as Brooks from offering residential service.

Interim Number Portability

The Recommended Orders state that they are adopting the FCC's position on both aspects of interim number portability ("INP"): 1) cost recovery; and 2) sharing of terminating access revenue. However, they seemingly accept without question U S West's asserted costs for INP and provide no guidance as to how terminating access revenues should be shared. Indeed, the Recommended Orders set no interim INP rates whatsoever. New entrants simply do not know now, nor will they soon know what the cost to them for INP will be.

The language in the Recommended Orders regarding INP cost recovery is unclear as to exactly how whatever costs are found to be appropriate are to be distributed. Read literally, it could be interpreted as requiring new entrants to absorb all of the costs - precisely the result argued by U S West and rejected by the Recommended Orders! A clearer way to phrase what Brooks believes to have been the intent of the Recommended Orders would read as follows:

> The reasonable and specific costs incurred by U S West solely to implement INP will be charged to all carriers, including incumbent local exchange companies, on the basis of taking such costs and dividing by the total number of lines in service for each provider, and then multiplying that per line amount times the number of ported numbers of each carrier providing service via ported numbers.

There is further concern to Brooks that many of the asserted costs of INP may well represent otherwise necessary trunking and switch enhancements that U S West would have had to install to serve its own customers regardless of whether or not it implemented INP.

Moreover, any facilities or assets installed by U S West to provide INP will revert back to the incumbent's sole use when permanent number portability is implemented in the next few years, but will already have been 100% paid for by new entrants such as Brooks.

The appropriate level of INP costs is yet to be determined. Brooks believes these costs to be more than offset by terminating access revenues properly due Brooks from U S West. On an interim basis, there should be no recurring charge for INP. This is consistent with the FCC's INP Order, which suggests that INP be provided at a nominal price if not zero.

Brooks also believes that the interim non-recurring charge adopted by the Recommended Orders is excessive. "Installing" INP requires only a modest software modification and a minor recordkeeping change. These hardly justify the kind of charge claimed by U S West and granted in the Recommended Orders.

"Most Favored Nation" Provision

The TCG Recommended Order explicitly rejected requiring a "most favored nation" ("MFN") clause in the U S West interconnection agreement. Again, this rejection appears to be based on a misinterpretation of the effect of the 8th Circuit's stay of an analogous provision of the FCC's Order. That stay in no way prevents the Commission from requiring MFN provisions independent of the FCC's Order.

Brooks intends to show in its upcoming arbitration that such provisions, sometimes also known as "second look" provisions, are routinely a part of agreements in competitive industries when costs and prices are rapidly falling or when market conditions are unstable. MFN is likewise consistent with one of the primary goals of the 96 Act, which was to enable competition in **all** telecommunications markets with non-discriminatory pricing for all service elements. The FCC recognized that large carriers with more market power such as AT&T or MCI could well extract more favorable terms from incumbent LECs than could smaller new entrants. It wanted the latter to be able to take equal advantage of the superior terms,

conditions, and pricing that a leveling of the playing field would provide so as to encourage a broad range of new market entrants.

At the very least, the Commission should indicate in these decisions that this issue will be decided on a case by case basis. Brooks should receive a fair opportunity to present its evidence to the Commission on this critical issue without being bound by decisions in proceedings in which it was prohibited by the Commission from participating.[1]

Performance Standards and Penalties/Liquidated Damages

The Recommended Orders appear to be inconsistent on this issue. Brooks believes, and will present evidence to this effect in its own arbitration proceeding, that liquidated damage/performance penalty provisions are essential protections against U S West being able to effectively destroy a competitor through bad service.[2] Simply having the ability to file a complaint with some government agency or the courts in the face of continuing bad service and loss of customers, and then waiting months or even years for a final decision while U S West uses every permissible means of delay and then appeals the decision anyway, is just not an adequate remedy when your business is going down the drain in the interim. It is certainly reasonable to provide sufficient contractual incentives to the incumbent and its employees through liquidated damage or performance penalty provisions to refrain from damaging behavior in the first place.

Brooks' fears are not just idle speculation or paranoia. They are based on prior painful experience. There are the well documented problems in the case of Rochester Telephone Company, and Brooks has had its own bad experiences with Ameritech - experiences that

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[1] Requiring MFN provisions would also mean that the Commission would not be locked in to positions favoring U S West as a result of the MFS and TCG arbitrations before even hearing the evidence from petitioners such as Brooks.

[2] U S West's tract record for providing inadequate service to its own customers does not fill Brooks with confidence about the quality of service that will be provided a competitor.

teach that incumbents will take every available opportunity to provide bad service to their competitors under a myriad of disguises and excuses. It is far better to anticipate such behavior and do what is possible to prevent it in advance than attempting to patch the problem after there has already been irreparable harm to the new entrants, to their customers, and to the reliability of the public network itself.

RESPECTFULLY submitted this 28th day of October, 1996.

SNELL & WILMER L.L.P.

By: Thomas L. Mumaw
Thomas L. Mumaw

Attorneys for Brooks Fiber Communications of Tucson, Inc.

CERTIFICATE OF SERVICE

The original and ten (10) copies of the foregoing document were filed with the Arizona Corporation Commission on this 28th day of October, and service was completed by hand delivering or faxing a copy of same this 28th day of October, 1996, on or before 10 a.m., to all parties of record herein as well as to the Arbitrator in the above-captioned proceeding.

Dody Nunley